



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

[Docket No. FHWA-2014-0006]

Draft Availability Payment Concessions Public-Private Partnership Model Contract Guide

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice; Request for comments.

SUMMARY: On July 17, 2014, the President announced the Build America Investment Initiative, a government-wide effort to increase infrastructure investment and economic growth by engaging with state and local governments and private sector investors to encourage collaboration, expand the market for public-private partnerships (P3s) and put Federal credit programs to greater use. As part of that effort, the Presidential Memorandum tasked the U.S. Department of Transportation (USDOT) to establish the Build America Transportation Investment Center (BATIC), a one-stop-shop for state and local governments, public and private developers and investors seeking to utilize innovative financing and P3s to deliver transportation projects. USDOT has made significant progress in its work to expand access to USDOT credit programs, spread innovation through tools that build capacity across the country, and deliver project-focused technical assistance to help high-impact projects develop plans, navigate Federal programs and requirements, and evaluate and pursue financing opportunities. This

includes an effort to provide a range of technical assistance tools to project sponsors, including a series of model contract provisions for popular P3 project types.

Development of these tools fulfills a requirement under Moving Ahead for Progress in the 21st Century Act (MAP-21) that FHWA to develop public-private partnership (P3) transaction model contracts for the most popular type of P3s for transportation projects. Based on public input favoring an educational, rather than prescriptive, contract model, FHWA is publishing a series of guides describing terms and conditions typically adopted in P3 concession agreements. The FHWA values public input in the development of the model contract guides, and seeks continuing input. All documents in this series share the same Docket Number (FHWA-2014-0006).

To address the most popular types of P3s, FHWA is producing separate guides to the two most common agreements for concessionaire compensation: user tolls and availability payments (APs). For the purpose of public comment, the Toll Concessions Guide was divided into two parts. The first part, addressing the highest profile (“Core”) provisions, was published in final form on September 10, 2014. The second part (the “Addendum”), addressing additional substantive provisions, was published in draft form on January 16, 2015. As described below, FHWA is deferring publication of the final version of the Addendum in order to obtain public comment on additional material (provided with this announcement) relevant to the concessions guides.

With this notice, FHWA publishes a Draft Availability Payment Concessions P3 Model Contract Guide (“AP Concessions Guide”) so that the general public and interested stakeholders may provide comments. The AP Concessions Guide can be found on the Docket (FHWA-2014-0006) and at the following link:

<http://www.fhwa.dot.gov/ipd/pdfs/p3/apguide.pdf>. This model contract guide has been prepared solely for informational purposes and should not be construed as a statement of DOT or FHWA policy.

In addition, a separate chapter on Labor Best Practices recommended by the U.S. Department of Labor has been added to the Docket and is available at the following link: <http://www.fhwa.dot.gov/ipd/pdfs/p3/laborbestpractices.pdf>. This chapter discusses labor provisions recommended by the U.S. Department of Labor for all P3 concession agreements, following a collaboration with USDOT, regardless of source of funding (i.e., Federal, State, or private) or form of compensation (i.e., user tolls or APs). The FHWA intends to incorporate this chapter into the final contract guides for both user toll and AP concessions; therefore, FHWA is seeking public comment on this document prior to finalizing the Toll Concession Addendum.

DATES: Comments must be received on or before [INSERT DATE THREE WEEKS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Late comments will be considered to the extent possible.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12-140, Washington, DC 20590-0001.

- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.

- *Instructions:* You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mark Sullivan, Office of Innovative Program Delivery, (202) 366-5785, mark.sullivan@dot.gov, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington DC 20590, or Alla Shaw, Office of the Chief Counsel, (202) 366-1042, alla.shaw@dot.gov, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington DC 20590.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may submit or retrieve comments online through the Federal eRulemaking portal at: <http://www.regulations.gov>. The Web site is available 24 hours every day of the year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Office of the Federal Register’s home page at: http://www.archives.gov/federal_register and the Government Printing Office’s Web page at: <http://www.gpoaccess.gov>.

Background

P3s are contractual arrangements between public and private sector entities that allow for greater participation by the private sector in the delivery of surface

transportation projects and associated services. Generally, in addition to designing or building a project, a private partner in a P3 may be involved in financing, operating and maintaining the project. By transferring certain risks and responsibilities to the private partner, P3s can result in more efficient and effective project delivery. However, P3 contracts are more complex and of a much longer duration than traditional construction contracts. Their terms and conditions address many non-traditional requirements, such as financing arrangements and performance during the lengthy concession period. Public agencies need expertise to negotiate P3 concession agreements successfully. Section 1534(d) of MAP-21 (Pub. L. 112-141; 126 Stat. 584) requires the DOT to develop P3 contracts that could serve as a model to States and other public transportation providers in developing their own P3 contracts.

After considering written comments responding to a notice published at 78 FR 1918 on January 9, 2013, as well as those received during a Listening Session on January 16, 2013, FHWA chose to develop the model contracts as informational guides, rather than prescriptive templates, for State and local governments entering into P3 transactions.

About the Availability Payment Concessions P3 Model Contract Guide

The second most common P3 contract uses APs to compensate a concessionaire. In an AP concession, scheduled government appropriations provide periodic payment to the concessionaire during the term of the agreement, which is typically 30 to 40 years. Payments can be adjusted for non-availability of the facility or for operational non-performance. Many provisions in AP contracts are similar to those in toll revenue contracts.

The AP Concessions Guide focuses on issues critical to achieving public sector objectives and protecting the interest of the taxpaying and traveling public. The Draft AP Concessions Guide focuses on nineteen specific provisions. Unlike the Toll Concessions Guide, which for reasons of public comment was split into separate Core and Addendum sections, the AP Concessions Guide incorporates all provisions into a single document, with the following chapter headings:

1. Introduction
2. Completion Testing and Performance Security
3. Availability Requirements
4. Maintenance and Handback Requirements
5. Payment Mechanism, Performance Monitoring and Financial Model
Adjustments
6. Insurance
7. Contract Term and Nature of the Proprietary interest
8. Supervening Events
9. Change in Law
10. Department and Developer Changes
11. Assignment and Changes in Equity Interests
12. Defaults, Early Termination, and Termination Compensation
13. Indemnities
14. Federal Requirements
15. Amendment to Key Developer Documents
16. Lenders Rights and Direct Agreement

17. Department Step-in

18. Disputes

19. Intellectual Property

20. General Provisions

The AP Guide Concessions Guide can be found on the Docket (FHWA-2014-0006) and at the following link: <http://www.fhwa.dot.gov/ipd/pdfs/p3/apguide.pdf>.

About the Labor Best Practices Recommendations

Any project, including a P3 concession, that receives Federal assistance pursuant to title 23 of the United States Code, must comply with all Federal laws, including labor laws, pertaining to the use of Federal funds. However, as a best practice, the U.S. Department of Labor encourages parties to a P3 agreement to consider adopting labor practices that provide worker protections beyond those required by law.

With this notice, FHWA is also publishing for public comment a separate chapter, authored by the U.S. Department of Labor, in collaboration with USDOT, on Labor Best Practices in P3 concessions. Because this chapter discusses issues applicable to both toll and AP concession contracts, FHWA will defer publication of the Final Toll Concessions P3 Model Contract Guide Addendum until receiving comments on this additional document. The Labor Best Practices chapter includes the following topics:

- Prevailing Wages and Fringe Benefits
- Employee Benefits
- Incumbent Worker Nondisplacement and Protections
- Workforce Development and Apprenticeship
- Workplace Health and Safety

- Wage and Classification Transparency
- Equal Employment Opportunity
- Project Labor Agreements
- Responsible Contractor Policy

The Labor Best Practices chapter can be found on the Docket (FHWA-2014-0006) and at the following link:

<http://www.fhwa.dot.gov/ipd/pdfs/p3/laborbestpractices.pdf>.

The FHWA intends to incorporate the Labor Best Practices chapter into both of its P3 concession guides. Upon conclusion of the public comment process, the final Toll Concessions Guide (combining the Core and Addendum provisions) and the final AP Concessions Guide will be posted on the FHWA Web site at

<http://www.fhwa.dot.gov/ipd/p3/>.

Authority: Section 1534(d) of Moving Ahead for Progress in the 21st Century, MAP-21, enacted Oct 1 2012.

Issued on: September 21, 2015.

Gregory G. Nadeau,

Administrator,

Federal Highway Administration.

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